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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 75-1906

ROBERT J. HENDERSON, Superintendent, Auburn Correctional Facility, Auburn, New York,

Petitioner,

-against-

BARRY WARREN KIBBE,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To: THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit granting the petition for writ of habeas corpus and included as Appendix A to the petitioner's appendix is now officially reported at 534 F.2d 493.

QUESTION PRESENTED

Whether the court of appeals applied established principles of law to the facts of this case and whether such application presents a substantial issue for consideration by the Court.

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STATEMENT OF THE CASE

Respondent was convicted of second-degree murder[1] pursuant to New York Penal Law §125.25(2) which provides:

> A person is guilty of murder in the second degree when:
>
> 2. Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person;

The facts of this case, which were characterized by the majority opinion of the court of appeals as "bizarre", are set forth in the opinion of the court. (Pet. App. 3a-5a[2]). They indicate that at trial it was established that the victim, George Stafford, died as a result of injuries he sustained when he placed himself in the middle of the road and was hit by a speeding truck driven by a Michael Blake. The accident occurred at approximately 10:10 p.m.

Approximately 30 minutes before Blake's vehicle struck Stafford, respondent and his co-defendant Roy Krall had robbed Stafford and abandonned him on the shoulder of a two lane two directional roadway between Rochester and Canandaigua, New York. The three had met earlier in a bar in Rochester and had consumed substantial amounts of alcohol before Krall and respondent drove Stafford, at his request, to Canandaigua.

There was some dispute at trial as to where exactly respondent had left Stafford: the defense contended the spot was within view of and no more than 75 feet from an open and lighted gas station; the prosecution argued that it was one quarter of a mile from the station. The testimony did esta-

[1]Respondent's other convictions for robbery in the second degree and grand larceny in the third degree were unaffected by this habeas corpus proceeding. Respondent was sentenced to five to fifteen years on the robbery conviction, and up to four years on the grand larceny conviction. He is presently serving those sentences.

[2]Numberals in parenthesis preceded by "Pet. App." are referances to pages in the appendix to the petition.

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blish without contradiction that prior to the time that the truck driver Blake saw Stafford in the road, Blake was warned that something was wrong by an on-coming motorist who had signalled to Blake by flashing his headlight. Immediately thereafter Blake saw Stafford sitting in the middle of the north-bound lane, but, although the road was dry, he did not apply his brakes or an attempt to avoid hitting him.[3] According to Blake, he didn't have time to react.

The defense to the murder charge was that respondent's conduct did not cause Stafford's death. Cross-examination of the prosecution's witnesses was directed at establishing Blakes' responsibility for Stafford's death. Defense motions prior to trial, after the prosecution rested and at the close of the entire case, sought relief on the grounds that the State had failed to demonstrate causation.

Despite the fact that causation was the critically disputed element at the trial, the instruction to the jury on the murder charge was devoid of any instruction on this complex legal issue. Indeed, the only reference to causation was the single use of the word itself in the verbatim recital of the penal law section involved.

The court of appeals majority, restricting its decision to "the limited and singular facts of this case," held that the omission of an instruction on the element of causation permitted the jury to conclude that causation was not an issue or that causation could be inferred merely from the fact that Stafford would not have died "but for" respondent's conduct. (Pet. App. 9a-10a). The court of appeals explained that the

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[3]The testimony was that the wind was blowing some fallen snow but it was undisputed that the sky and the road remained clear.

absense of an instruction on the difficult concepts of indipendent or supervening cause prevented the lay jury from resolving disputed questions of fact so as to determine the controlling issues in the case: whether the ultimate result was foreseeable to respondent, and whether the actions of the truck driver and/or Stafford were superceding causes (Pet. App. at 10a-12a).[4] The court concluded:

> . . . There was evidence that Kibbe and Krall abandoned Stafford near an open and lit service station and that although Stafford was intoxicated he was not helpless. It also appeared that Blake was less than diligent in the operation of his motor vehicle. If the jury had been cognizant of the proper legal standards, this evidence, if believed, could have injected an element of reasonable doubt into the jury's deliberations as to whether defendants foresaw or could have foreseen that about one-half hour after they abandoned Stafford he would be struck in the middle of a highway lane by the driver of a speeding truck who failed to react in such a way to avoid a collision.
>
> We are convinced that the trial judge's incomplete instructions took a necessary determination of causation of death from the jury and thereby deprived appellant of his right to due process. See United States ex rel. Smith v. Reincke, 239 F.Supp. 887 (D. Conn.), aff'd, 354 F.2d 418 (2d Cir. 1965); cert. denied, 384 U.S. 993 (1966). See also United States v. Singleton, Docket No. 75-1114 (2d Cir. Feb. 13, 1976); United States v. Hines, 256 F.2d 561, 564 (2d Cir. 1958). . . .
>
> (Pet. App. at 13a)

REASONS FOR DENYING THE WRIT

Petitioner seeks review of the court of appeals decision on the ground that the court failed to comply with the dictates of Cupp v. Naughton, 414 U.S. 141 (1973) in that it did not evaluate the challenged jury instruction in the context of the entire case.

I.

Review of the majority opinion establishes that the court of appeals scrupulously complied with Cupp v. Naughton, supra.

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[4] While the dissenting opinion acknowledges that the charge on causation could have been more "definitive" and should have included an explanation of "proximate," "superseding" and "intervening" causation, the opinion concludes that summations by counsel sufficed to apprise the jury of what they had to determine (Pet. App. at 16a).

As an initial matter the opinion carefully assessed and rejected the claim that the arguments of counsel compensated for the omission in the charge. The opinion points out how all the defense motions on the failure to establish causation were made outside the presence of the jury. Further, the opinion explains that the causation argument included in defense counsel's summation was neutralized by defense counsel's correct statement that the remarks of counsel did not constitute evidence and that the trial judge alone was responsible for instructions on the law[5] (Pet. App. at 10a n.5). See also, Bollenbach v. United States, 326 U.S. 607, 612 (1946).[6]

Moreover, the majority's detailed analysis of the evidence in the context of the law of causation support the court's holding that the deficiencies in the charge prevented the jury from making the requisite findings on the element of causation. Specifically, the opinion enumerates how an explanation of "intervening" and "supervening" cause, though absent here, was "essential" to the jury's evaluation of Blake's conduct

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[5]Ironically, the dissenting opinion which accepts the theory of "corrective summations" relies for support on a portion of the prosecutor's summation which misinformed the jury on the criterion by which they were to assess causation. In pertinent part, the summation provided:

> . . . Or to put it differently, would this man be dead had it not been for the acts of these two defendants?
> (Pet. App. n.1 at 15a)

If the jury had indeed been guided by this summation it would have concluded simply, but incorrectly, that causation was established merely by a finding that "but for" the respondent's actions, Stafford would not have died. W. La Fave and A. Scott, Criminal Law 257-63 (1972).

[6]In an Amicus Curiae petition the Monroe County District Attorney argues that the error in the charge was waived, an issue that the New York State Attorney General properly declined to raise. Both the majority and dissenting opinions of the court of appeals make plain that the issue of causation was repeatedly raised by the defense, that both the prosecutor and the trial judge were aware that it was the focal point of the defense, and that the failure to object to the charge was merely "inadvertent" (Pet. App. 6a-9a).

for purposes of determining if he had been so reckless as to absolve respondent of legal responsibility (Pet. App. at 11a n.6).

Similarly, the opinion makes clear that the failure to instruct precludes comprehension of the importance of certain disputes as to fact. For example, absent instruction, the jury had no way of knowing that determination of where Stafford had been left on the road was critical on the controlling questions of foreseeability to respondent and whether Stafford failed to do something easily within his grasp to extricate himself from danger (Pet. App. at 12a-13a).

On these facts, the court below recognized that a jury, properly instructed, might well have been left with a reasonable doubt as to respondent's legal responsibility for Stafford's death. Therefore, the court was correct in its conclusion that:

> . . . the trial judge's incomplete instructions took a necessary determination of causation of death from the jury and thereby deprived appellant of his right to due process. See United States ex rel Smith v. Reincke, 239 F. Supp. 887 (D. Conn.), affirmed 354 F.2d 418 (2d Cir. 1965); cert. denied, 384 U.S. 993 (1966). See also, United States v. Singleton, Docket No. 75-1114 (2d Cir. Feb. 13, 1976); United States v. Hines, 256 F.2d 561, 564 (2d Cir. 1958).

II

Petitioner does not contest the principle that errors in a state court jury instruction can result in a denial of due process cognizable in a federal habeas corpus proceeding. Cupp v. Naughton, supra, 414 U.S. at 146-7; Cool v. United States, 409 U.S. 100 (1972); In re Winship, 397 U.S. 358, 364 (1970). See also Vachon v. New Hampshire, 414 U.S. 478, 480 (1974). Rather, the claim is that the conceded deficiencies in the charge here were adequately ameliorated by the arguments

of counsel in summation so as to preclude finding a due process violation. Certiorari should not be granted solely to review the court of appeals application of established and uncontested principles of law to the particular and unique facts of any one case.

Petitioner's dire prediction that the majority opinion will open the flood gates to "hundreds" of habeas corpus petitions is belied by the fact that the court of appeals complied with the requirements of Cupp v. Naughton, supra. The decision creates no new law and by its own language, is restricted to "the limited and singular facts of this case" (Pet. App. at 9a).

CONCLUSION

Since the decision below is correct and since there is no substantial question presented to the Court, the petition for writ of certiorari should be denied.

Respectfully submitted,

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